No. 2914.

In the United States Circuit Court of Appeals

For the Ninth Circuit

SOCIETE NOUVELLE D'ARMEMENT,
Plaintiff in Error,

vs.

J. R. BARNABY, Defendant in Error,

PETITION FOR REHEARING

JAMES KIEFER,
Attorney for Plaintiff in Error.

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To the Honorable, the Judges of the above entitled Court:

The plaintiff in error respectfully petitions the Court to grant a rehearing and reargument of this case upon the following grounds:

I.

The court, at page 7 of the opinion filed treats of the objection of plaintiff in error to the introduction of evidence, not in the light of the record as it

existed at the time when the objection was made but in the light of the evidence thereafter introduced over such objection. We submit that this must have been an inadvertence on the part of the court. The objection of the plaintiff in error should have been considered and disposed of upon the record as it stood when it was made. The record as it then stood contains the plain and unmistakable allegation in the complaint that "during said three years last past the defendant has maintained and is now maintaining a general agent at Seattle, Washington, for the more convenient transaction of its business in said state." It also contains a further allegation in the following paragraph of the complaint that the defendant in error had ceased to be the agent of plaintiff in error on June 6th, 1912. The allegation of maintaining an agency which we have quoted above was admitted in the answer of the plaintiff in error. This allegation of the defendant in error as to said agency is to be taken as a conclusive judicial admission and no evidence was proper to be received under it.

Wulff vs. Manuel, 23 Pac. 723.

J. Hendy Machine Works vs. Pacific Cable Construction Co., 33 Pac. 1084.

It is the established rule of law that facts admitted in the pleadings are equivalent to findings made by the court and are equally conclusive.

Miller vs. Head Camp W. O. W., 77 Pac. 83.

A party cannot contradict judicial allegations of his petition to the prejudice of his adversary who has in good faith accepted and acted on them.

State vs. Judges of Appeals, etc., 34 La. Ann. 1220.

An averment of title in respondents, declaring title to be in respondents found in a petition for condemnation, is conclusive upon petitioner and respondents need not prove their title.

Sanitary District vs. Chicago, etc., Ry. Company, 75 N. E. 248.

Where facts are admitted in the pleadings no proof is necessary or proper.

Scheldt vs. Board of Com., 122 Pac. 910.

We submit, therefore, that the allegation in the complaint of the defendant in error was absolutely binding upon him. This view is further strengthened by consideration of plaintiff's Exhibit 24, offered in evidence Record 64, and the testimony of the witness Gorham. An examination of Exhibit 24 will dis-

close that on October 14th, 1914, the defendant in error and the plaintiff in error stipulated that for three years prior to that time plaintiff in error had been represented by an agent and had maintained an office in the City of Seattle. When defendant in error was called for further interrogation, upon cross-examination by Mr. Kiefer he testified, that he was agent for defendant in Seattle continuously from 1907 up to about the time this controversy over his compensation arose early in 1912, about April, 1912.

An examination of the record, page 55, will disclose that the testimony of Captain Jolivet was not offered upon this question and was not so received by the court or so considered by either counsel. Captain Jolivet had been asked concerning his experience for the purpose of qualifying him as an expert witness as to the value of the services of the defendant in error, and was thereafter asked this question:

"Q. What in your judgment, Captain, is the reasonable value of Mr. Barnaby's services?

Mr. Gorham: We desire to ask the Captain a question or two before he answers that.

THE COURT: Very well.

CROSS-EXAMINATION.

By Mr. Gorham:

Q. You are the agent for the defendant corporation, in this suit at bar?

A. Yes.

Q. How long have you acted as such agent?

A. Three years.

Q. You are their resident agent at Seattle, in full charge of their business here?

A. Yes.

Q. Employ counsel to defend this suit?

A. Yes."

And thereupon the witness answered the question as an expert and counsel for defendant in error offered no further cross-examination. We submit that the context of this witness' entire testimony, including his cross-examination, showed that the purpose and object of counsel for defendant in error was simply to show the interest of Captain Jolivet in the controversy with a view to more or less affecting the weight of his evidence. There was nothing whatever to direct the attention of counsel for plaintiff in error or of the court to any purpose to use this to vary or modify the allegations of the complaint. Had there been it would have promptly been objected to.

It is perfectly patent from the testimony of the defendant in error just referred to and from the complaint and the entire theory of the cause in the lower court that the claim now made upon the testimony elicited upon the cross-examination of the witness Jolivet is the merest afterthought. The view taken by the court of this testimony clearly allowed the defendant in error to introduce testimony for one purpose, and later, when he finds his theory of the case not in accordance with the law, to seek to profit by this testimony as though it were in generally and to thereby contradict his solemn averment of jurisdictional facts. He, himself, has alleged and testified to a state of facts which started the statute of limitations running in April, 1912, when he demanded payment of this account. The record throughout shows that counsel for defendant in error tried his case in the court below upon the theory of the application of six years statute of limitations; his complaint is drafted upon that theory; and his stipulation, plaintiff's Exhibit 24, shows that. The opinion of the trial court shows that the case was tried upon the theory of the six years statute, and we most earnestly urge upon this court that this judgment should be reversed and the case dismissed for the reason that plaintiff in error made the point of the statute of limitations by its ob-

jection to the introduction of any testimony upon the ground and its objection should be disposed of upon the record as it then stood. This court says in its opinion that upon a demurrer the complaint would be construed against the pleader. What else is our objection to the introduction of evidence but a demurrer *ore tenus*, and we certainly are entitled to have it ruled upon as such and not ruled upon as a demurrer to the evidence, as has been done.

An objection to the admission of evidence is equivalent to a demurrer *ore tenus*.

Belknap Glass Co., Appellant, vs. Kelleher et al, 72 Wash 529.

Hindle vs. Holcomb, 34 Wash. 336.
(See bottom page 339)

Rothe vs. Rothe, 31 Wis. 570.

The opening statement of counsel is proper for the consideration of the Court in passing upon the objection to the introduction of evidence.

Oscanyan vs. Arms Co., 103 U. S. 261.

The court should consider this case and compel the defendant to try this case upon appeal upon the same theory upon which he tried it in the court below, namely, that the contract sued upon was a contract in writing and therefore within the six years statute of limi-

tations, and his solemn averment that for a period of more than three years prior to bringing the action the plaintiff in error was represented by an agent within the jurisdiction so as to be capable of being sued. If his theory as to the the character of his contract is wrong he should be held to the consequences and he should not be permitted to escape by now contending in opposition to the solemn averment of his complaint, and admitted by the answer.

U. S. vs. Kettenbach, 208 Fed. 209.

Elliott on Appellate Procedure, Secs. 489, 490, 491 and 492.

Webb vs. Rosemond, 90 S. E. 306.

Belcher vs. Young, 90 Wash. 303.

Wichers vs. Wichers, 70 Southern 40.

Delano vs. Roberts, 182 S. W. 771.

The Court in its opinion undoubtedly overlooked one of the provisions of the statute of the State of Washington respecting the running of the statute of limitations. Actions may be begun in two ways in the State of Washington, namely, by the service of summons or the filing of a complaint.

> "Actions in the several Superior Courts of this State shall be commenced by the service of a summons, as hereinafter provided, or by filing a complaint with the county clerk as the clerk of the Court . . ."

Rem. & Bal. Code, Sec. 220.

It is further provided by Section 167, Rem. & Bal. Code,

> "The limitations prescribed in this act (Chapter) shall apply to actions . . . an action shall be deemed commenced when the complaint is filed."

In *Blalock vs. Condon,* 51 Wash. 604, *Service vs. MacMahon,* 42 Wash. 452, and in numerous other cases the Supreme Court of the State of Washington has held that service of summons without the filing of the complaint will not toll the statute. According to the allegations of the complaint of the defendant in error and according to his own testimony the defendant in error could at any time within three years after April, 1912, not only have filed his complaint, but he could have obtained service. It, however, appears that the obtaining of service without filing the complaint would not have tolled the statute. If service were necessary under our statute to start the action and toll the statute the point made by the defendant in error in this court but not in the court below might be worthy of serious consideration, but in the face of the statutory provision of the State of Washington that for the purposes of the statute of limitations an action shall be deemed begun when the complaint is filed, it must become evident that the issue of service of summons is

irrelevant. We presume, therefore, that this court has overlooked the statutory provision or had added to the exceptions provided in the statute, something which we respectfully suggest is beyond the power of this or any other court.

II.

The court, at page 6 of the opinion, says that the plaintiff in error made no request for a general finding. We submit that the court overlooked the state of the record. At page 65 of the record this occurs: "And Mr. Kiefer on behalf of the defendant contends that his objection to the introduction of any evidence in support of the complaint must be sustained and the evidence stricken, and further that in any event under all the evidence in the case the defendant was entitled to a judgment." The opinion of the trial court clearly shows that the court treats what occurred as a request from counsel for both parties to find generally for their respective clients. While the language here is somewhat informal, it clearly indicated to the trial court that both parties were requesting general findings in their favor.

We respectfully submit that the foregoing language is a sufficient challenge to the evidence and cer-

tainly ought to be given force and effect as a request for a general finding in favor of the plaintiff in error.

National Surety Co. vs. U. S., 200 Fed. 142.
Bunday vs. Huntington, 224 Fed. 847.
Paul vs. Del. L. & W. R. Co., 130 Fed. 951.

That being so, the inquiry arises as to whether or not there was any competent evidence to support the court's finding in favor of the plaintiff, and this brings us to a discussion of the question of the admissibility of the evidence of the witness Barnaby. This matter is disposed of by this court on pages 9 and 10 of the opinion and is embraced in the 11th to 18th assignments of error.

It appears to counsel that the court has unwittingly overlooked the exact state of the record, particularly the stipulation hereafter referred to. In the action in the Superior Court the plaintiff in his complaint, defendant's Exhibit "A," sets up that between November 12, 1909, and January 5th, 1914, he rendered services to plaintiff in error as a "ship's broker." Originally the complaint in the cause at bar alleged services rendered as "ship's broker" between October 29th, 1910, and June 6th, 1912. The court will observe that the dates of the period set up in the first action included all of the period set up in the cause at

bar for identical services, namely, "ship's broker." The court will also note that before the amendment in the cause at bar erasing the words "ship's broker" and inserting "ship's agent," it was stipulated between counsel that this amendment should not prejudice defendant's plea of former recovery (Record 23). Again it was stipulated before defendant rested that the amendment of the complaint in the cause at bar should not alter the force and effect of the judgment of the Superior Court as a bar, if otherwise a bar and that for that purpose the term "ship's agent" should be considered by the court to mean the same as "ship's broker" (Record 56).

Certainly the effect of this stipulation is to abrogate the trial amendment so far as it affects the right of the plaintiff in error to urge the plea of former recovery, and the case at bar is one brought for the *same kind of services* rendered during a portion of the period covered by the former recovery. No testimony could possibly be received to show otherwise in the face of such an admission in the pleadings in the case at bar and the record in the first suit.

When the testimony covered by our 11th to 18th assignments of error inclusive was offered there was before the court the record of the judgment in the Superior Court showing that the defendant in error had

recovered for all his services as "ship's broker" during a period embracing all of the period sued for in the case at bar for the *same kind of services*. We submit that this record was absolutely conclusive upon the defendant in error. The trial court and this court both appeared to think that he sued in one case for services as a "ship's agent" and in the other for services as "ship's broker," overlooking the stipulation we have above referred to, the effect of which stipulation as to make both actions for exactly the same services and both of them upon a *quantum meruit*. This state of the record surely makes all of the testimony covered by these assignments of error incompetent. The defendant in error was bound by his own records as he made them and his solemn stipulation at the bar of the court upon trial. We submit that by his pleadings in the two cases the defendant in error has absolutely shut out the testimony embraced in these assignments and which it is admitted that the lower court received over our objection and exception. Surely this court must have overlooked the two stipulations to which we have called attention. If these two stipulations upon the trial are to be given any force and effect it must be that we have here at bar a suit for services as "ship's broker" alleged to have been rendered during a period for which recovery for same service had already been

had in the first action. If this is true then our objection to the admission of the testimony must be sustained, and our assignments 11 to 18 are well taken. We refer to the authorities in our brief.

III.

At page 10 of the opinion the court concedes that the 9th and 10th assignments are well taken in the sense that the evidence was not admissible, and goes on to say that it was obviously harmless. We respectfully question the logic of this statement. It is unnecessary to cite authorities to this court to the effect that the findings of fact of a Federal trial court, sitting without a jury, have all the force and effect of a verdict of a jury. Neither is it necessary to cite authorities to the effect that if testimony is improperly admitted and permitted to go to a jury the verdict must be set aside and a new trial granted. There may be good reason for saying that testimony may be admitted for what it is worth before a jury, but it is hard to conceive of more damaging testimony than that which forms the basis of these two assignments.

A very vital question before the court was the amount of plaintiff's recovery. The testimony on behalf of the defendant in error showed $5,000.00 and upwards.

That on behalf of the plaintiff in error placed the value of the services around $500.00. The evidence objected to under these two assignments consists, first, of the bill which the plaintiff Barnaby stated was the amount paid by plaintiff in error to its representative in London, England, in the litigation over the Raithwaite Collision. This was followed up by the evidence of the witness Currie comparing the value of such services in England with the value of such services here. If this bill for 400 pounds Sterling, or substantially $2,000.00 in our money, is doubled, as was done by the witness Currie at page 51 of the record over our objection and exception, we have just about the amount of recovery allowed the defendant in error. It is a singular coincidence if the trial court was not influenced by this testimony in making up his finding of the amount. It is certainly illogical to say that the admission of improper testimony vitiates the verdict of the jury but does not vitiate the finding of the trial court sitting without a jury and give to the finding of the trial court all the conclusive effect of a verdict. A trial court might well permit testimony which he considers of little weight to go to a jury or he may admit testimony and tell them to disregard it. It is utterly illogical, however, to say that a trial court sitting without a jury may admit testimony going to one of the

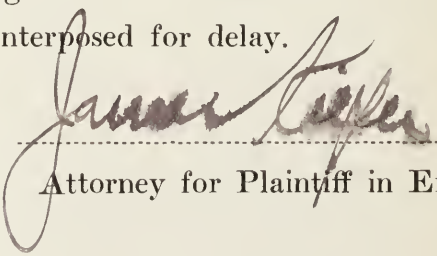
vital issues and hold that this does not vitiate his finding, to hold that he disregarded it.

Surely the trial court was not perpetrating a joke when he admitted this evidence; he was expecting to consider it and did consider it, and we have not the least doubt that he gave it substantial weight and that it entered materially into the making up of his finding of the amount.

For the reasons that we have herein pointed out, we respectfully request that a rehearing and reargument of this case should be granted.

JAMES KIEFER,
Attorney for Plaintiff in Error.

I James Kiefer, attorney for plaintiff in error, do hereby certify that the foregoing petition for rehearing is in my judgment well founded in law and that the same is not interposed for delay.



Attorney for Plaintiff in Error.